Date: September 20, 1995

Case No.: 95-ERA-1

In the Matter of:

C. D. VARNADORE,

Complainant

v.

OAK RIDGE NATIONAL LABORATORY, MARTIN MARIETTA ENERGY SYSTEMS, INC.(MMES); MARTIN MARIETTA CORP. (MMC); MARTIN MARIETTA TECHNOLOGIES (MMT); ORNL AND MMES MEDICAL, HEALTH, HEALTH PHYSICS, OCCURRENCE REPORTING, ENVIRONMENTAL MONITORING AND INDUSTRIAL HYGIENE DEPARTMENTS; MS. M. ELIZABETH CULBRETH, ESQ.; WILBUR DOTREY SHULTS, PH.D.; SECRETARY OF ENERGY HAZEL O'LEARY AND DEPARTMENT OF ENERGY; OAK RIDGE OPERATIONS,

Respondents

RECOMMENDED ORDER OF DISMISSAL

In his Complaint of August 2, 1994, the Complainant alleges four counts, each of which contain several additional claims alleging numerous violations by the multiple Respondents under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C. § 7622, the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622, the Resource Conservation and Recovery Act (RCRA, or as also known, the Solid Waste Disposal Act, SWDA), 42 U.S.C. § 6971, the Comprehensive Environmental Response Compensation and

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Liability Act (CERCLA), 42 U.S.C. § 9610, the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i), and the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 [hereinafter also referred to collectively as "the

Acts"]. The employee protection (whistleblower) provisions of the above-referenced statutes, and implementing regulations thereunder, unanimously proscribe any employer from taking any adverse employment action against an employee, relating to the employee's compensation, terms, conditions or privileges of employment, in retaliation for the employee's assistance or participation in proceedings or any other action that furthers the purposes of the environmental statutes at issue. 29 C.F.R. § 24.2(a).

Respondent, the United States Department of Energy (DOE), on November 21, 1994, filed a motion to dismiss the Complainant's complaint, and all counts alleged therein, against the DOE. Similarly, Respondent Martin Marietta Energy Systems (MMES) and the other named respondents also filed a joint motion on November 21, 1994 requesting dismissal of all counts of the Complainant's complaint. Complainant responded to these motions with a memorandum in opposition on December 27, 1994. The DOE filed supplements to its motion to dismiss on April 24 and August 18, 1995.

Issues:

It is not in dispute that the Complainant's on-going litigation of multiple claims against MMES, *et. al*, constitutes a protected activity under each of the whistleblower provisions. Thus, the remaining issues are:

1) Whether the Complaint was timely filed;

2) Whether the named Respondents are liable under the whistleblower provisions for the acts alleged in the Complaint;

3) Whether the acts alleged constitute adverse employment actions which affected the Complainant's compensation, terms, conditions, or privileges of employment; and,

4) Whether such acts were done in retaliation for the Complainant's protected activities.

Jurisdiction:

The above-referenced statutory provisions give to the

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Secretary of Labor the responsibility to assign to the Office of Administrative Law Judges employees' claims of discrimination under these statutes, if requested by a party, after the initial investigation of the claim by the Department of Labor (DOL). 29 C.F.R. § 24.1(a). The administrative law judge is instructed to conduct a hearing, if necessary, and to make a recommended decision and order to the Secretary of Labor. 29 C.F.R. § 24.5 and 24.6(a).

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In appropriate cases, the administrative law judge may recommend dismissal of a claim for cause. 29 C.F.R. § 24.5(e)(4). After reviewing the recommended order, the Secretary of Labor

will issue a final order. 29 C.F.R. § 24.6(b).

Background:

The matter before me represents the Complainant's sixth complaint against MMES. The first three claims (92-CAA-2, 92-CAA-3, and 93-CAA-5) were consolidated into what is now known as *Varnadore I* and were heard by Administrative Law Judge Theodor Von Brand. The fourth and fifth claims (94-CAA-2 and 94-CAA-3) were consolidated into *Varnadore II* and were heard by Administrative Law Judge David Clarke. Both cases are presently before the Secretary awaiting a final order.

The sixth claim was investigated by the Wage and Hour Division, which found that:

> [t]he Department of Labor has no jurisdiction over how MMES, *et. al* funds its legal obligations, nor with whom it contracts for advice in pursuing its legal defense; we further have no jurisdiction over determining the proper organizational structure of the respondent companies.
>
> The alleged inadequate posting had no adverse effect on Mr. Varnadore as previous investigations by this office revealed that he was aware of the employee protection provisions of these statutes.
>
> None of the other alleged adverse actions occurred within the 180-day time limit for filing a complaint under the Energy Reorganization Act. Nor did any of the alleged adverse actions occur during the 30-day time period for filing complaints under the employee protection provisions of the other referenced statutes.
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> The Complainant appealed the Wage and Hour Division's

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findings and the matter was assigned by the Secretary of Labor to the undersigned administrative law judge.

Discrimination Claim:

If the Complaint's alleged facts, even if proven, nonetheless fail to make out a *prima facie* case of discrimination and thereby fail to entitle him to relief against the named Respondents under any of the whistleblower provisions, then the Complaint must be

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dismissed. In order to satisfy the *prima facie* case of discrimination under any of the above-referenced environmental whistleblower statutory provisions, the employee must demonstrate that:

1) the party charged with discrimination is an employer subject to the Act;
2) the employee engaged in protected conduct;
3) the employer took some adverse action against the employee; and
4) the protected conduct was the likely reason for the adverse action.

DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983) (ERA claim). The Secretary has held that the burden of proof on the complainant under the ERA whistleblower provision is applicable under all environmental whistleblower claims. *Wagoner v. Technical Products, Inc.*, 87-TSC-4 (Sec'y Nov. 20, 1990); *Polous v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec'y April 27, 1987). Under the ERA as amended, the Complainant must make out a "*prima facie*" case showing that his protected conduct was a "contributing factor" in the unfavorable personnel action alleged in the complaint. 42 U.S.C. § 5851(b)(3)(C). However, the Secretary has stated that a complaint under the whistleblower provisions simply must present evidence "sufficient at least to raise an inference" that the protected activity was the likely motive for the adverse action. *Howard v. Tennessee Valley Authority*, 91-ERA-36 (Sec'y Jan. 13. 1993). If the Complainant does not make this *prima facie* showing, the complaint must be dismissed. 42 U.S.C. § 5851(b)(3)(A).

Motion to Dismiss:

While the Rules for Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, found at 29 C.F.R. § 18, govern the matter before me, section 18.1(a) states that the Federal Rules of Civil Procedure (FRCP)

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shall be applied in any situation not provided for or controlled by these rules. Because the rules of practice and procedure do not provide guidance on motions to dismiss, FRCP 12 will govern the adjudication of the motion before me.

Only two provisions of FRCP 12 are applicable in this matter. Subsection (b)(1) states that a complaint may be dismissed for lack of jurisdiction over the subject matter, and subsection (b)(6) provides that a complaint may be dismissed for failure to state a claim upon which relief can be granted. A dismissal of a complaint for cause under FRCP 12(b)(6) does not violate the due process rights of the Complainant. *Rose v. Dole*, 945 F.2d 1331, 1338 (6th Cir. 1991).

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The Respondents also urge that the Complaint must be dismissed in its entirety because the statute of limitations for filing such a claim under the above-mentioned provisions expired before the Complainant's filing. Furthermore, some Respondents

contend that they are not the Complainant's "employer" as defined by the whistleblower provisions, and therefore are not valid parties to such claims. Finally, the Respondents' argue that the Complaint itself fails to conform to the FRCP and should be dismissed on that basis.

Timeliness:

With the exception of the ERA, the whistleblower provisions under which this claim of discriminatory treatment is brought all include a thirty-day statute of limitations for bringing a claim of discrimination. *See* 42 U.S.C. § 7622(b)(1) (CAA); 15 U.S.C. § 2622(b)(1) (TSCA); 42 U.S.C. § 6971(b) (RCRA or SWDA); 42 U.S.C. § 9610(b) (CERCLA); and 42 U.S.C. § 300j-9(i)(2) (SDWA). A claim under these provisions must be filed within thirty days of the discriminatory treatment which is the basis for the claim. The multiple acts of discrimination alleged by the Complainant all pre-date the Complaint's filing date by more than thirty days. Furthermore, no good cause has been demonstrated which would allowing tolling the filing period.

Consequently, all claims alleged under the CAA, TSCA, RCRA or SWDA, CERCLA and SDWA must be DISMISSED as untimely. The claims made under the ERA, which has a 180-day filing period, were filed in a timely fashion and will be discussed further. Also, the timeliness of specific allegations is discussed below.

Sovereign Immunity:

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Initially, I note that, assuming the Complaint was timely filed, dismissal of certain claims against the DOE would nonetheless be proper because the United States government has not waived its sovereign immunity under the TSCA. *Stephenson v. National Aeronautics and Space Administration*, 94-TSC-5 (Sec'y July 1, 1995). Furthermore, the Secretary has recently found that the DOE has not waived its immunity under the ERA. *Teles v. U.S. Department of Energy*, 94-ERA-22 (Sec'y Aug. 7, 1995). It is well settled that a waiver of the United States government's sovereign immunity must be unequivocal. *U.S. Department of Energy v. Ohio*, 112 S. Ct. 1627, 1633 (1992). The Secretary has made clear that the DOE has not unequivocally waived its sovereign immunity and thus made itself subject to the whistleblower provisions of the TSCA or ERA. *See Stephenson*, *supra*; *Teles*, *supra*. Consequently, all claims against

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the DOE under the TSCA and ERA must be DISMISSED under the doctrine of sovereign immunity.

Respondents:

Multiple parties have been named as Respondents in the Complaint now before me. The Complainant contends that he

suffered from discriminatory and/or retaliatory treatment at the hands of the following sources: Oak Ridge National Laboratory (ORNL), Martin Marietta Energy Systems, Inc. (MMES), Martin Marietta Corporation (MMC), Martin Marietta Technologies, Inc. (MMT), the Medical, Health, Health Physics, Occurrence Reporting, Environmental Monitoring and Industrial Hygiene Departments of ORNL and MMES, and ORNL Division Director Dr. Wilbur D. Shults.

Reviewing each of the Respondents, I find that many of them are improper parties and are not subject to individual liability under the referenced whistleblower provisions. Initially, I find that MMES represents the Complainant's employer and as such, MMES is liable for any violations of the whistleblower provisions at issue. ORNL is an unincorporated division of MMES and is not a legal entity. Any violation of the statutes at issue alleged to have occurred at or by ORNL will be attributed to MMES. Furthermore, the Medical, Health, Health Physics, Occurrence Reporting, Environmental Monitoring, and Industrial Hygiene Departments are unincorporated departments of MMES and as such, MMES is responsible for any statutory violations occurring at or by such departments. Also, MMT and MMC are the parent companies of MMES and have no individual liability in this matter. *See NLRB v. Fullerton Transfer & Storage*, 910 F.2d 331 (6th Cir. 1990);

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Armbruster v. Quinn, 711 F.2d 1332, 1337 (6th Cir. 1983). Moreover, individuals who are not employers are not subject to liability under the employee protection provisions of the TSCA and the CAA. *See Stephenson*, *supra*.
Thus, I find that allegations against Dr. Shults took place in the scope of his employment with MMES, and therefore all allegations concerning Dr. Shults also will be attributed to MMES. Consequently, all claims against Respondents MMC, MMT, ORNL, the Medical, Health, Health Physics, Occurrence Reporting, Environmental Monitoring, and Industrial Hygiene departments, and Dr. Wilbur Shults are DISMISSED.

The Complainant also alleges discrimination by Ms. Elizabeth Culbreth, former Director of the Office of Administrative Appeals for DOL and currently a consultant for MMES. I find that no facts alleged in the Complaint, even assuming complete veracity, could make Ms. Culbreth individually liable under the whistleblower provisions of the environmental statutes at issue. She never

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employed the Complainant or controlled his employment. *See Stephenson*, *supra*. Any acts allegedly committed by Ms. Culbreth took place during her consultant work with MMES. Therefore, I find that any acts found discriminatory on the part of Ms. Culbreth were committed in the scope of her employment with MMES, and therefore, are properly attributable to MMES. Therefore, all claims against Respondent Elizabeth Culbreth individually are DISMISSED.

The Complainant also alleges discrimination by the United

States Department of Energy (DOE), its Oak Ridge Operations Office and the Secretary of Energy Hazel O'Leary. Initially, I find that the Oak Ridge Operations Office is simply a satellite office of the DOE and thereby cannot constitute an independent party. Thus, the alleged actions of the Oak Ridge Operations Office will be attributable to the DOE. Additionally, I find that the alleged acts of Secretary O'Leary were taken in her position of Secretary and in the scope of her employment with DOE, and therefore are attributable to the DOE. Further, Secretary O'Leary was never the Complainant's employer and thus is not individually liable.*SeeStephenson*, *supra*. As a result, I find that all claims against the Oak Ridge Operations Plant and Hazel O'Leary individually are DISMISSED.

The merits of all claims alleged by the Complainant will be considered regarding MMES and DOE, as all other named Respondents have either been consolidated with either MMES or DOE or dis

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missed from the matter.

The Complaint:

Initially, I must note that the Complainant's Complaint consists of thirty-three rambling and disorganized pages, and as such, fails to conform with the FRCP. However, under the liberal rules which govern filing a complaint under the whistleblower provisions, such lack of conformity will not disqualify a com-plaint, as was urged by the Respondents. The Complaint contains multiple allegations of misconduct by the various Respondents, but fails to identify with any specificity which law, statute, or regulation such acts supposedly violated.

In order to provide complete fairness to all parties, I will consider whether each specific act of misconduct as alleged by the Complainant, if true, would establish an adverse employment action from which I could infer retaliation by the Respondent for the Complainant's prior litigation. The Complaint's various allegations of unlawful activity by the Respondents will be considered in the order in which they appeared in the Complaint and, for the sake of

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clarity, references to the specific paragraph in which such allegations were found will be included. Notwithstanding my prior findings on the issues of timeliness and sovereign immuni-ty, I will discuss the merits of the Complaint fully.

Count One: Squandering Vast Sums on Anti-Whistleblower Legal Defense

Under Count One, the Complainant alleges the following violations of law:

1) the wrongful funding of contractor litigation by the United States Department of Energy. *Complaint*, ¶ 3-6.

2) the violation of agency ethics rules by allowing Elizabeth Culbreth to be employed by MMES one year after leaving the Office of Administrative Appeals for the United States Department of Labor. *Complaint*, ¶ 11.

DOE Funding of MMES Litigation

The Complainant alleges that the DOE's funding of contractor litigation, as provided for under the Allowable Cost and Fees clause contained in DOE contract no. DE-AC05-940R21400 with MMES, somehow constitutes an adverse employment action which discrimi

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nates against him. In making such a claim, however, the Complaint fails to establish how the DOE is the Complainant's employer, as defined in the relevant statutory provisions, and thereby accountable for its actions regarding the Complainant under the various environmental whistleblower provisions. The Complainant argues that the whistleblower provisions use the terminology "person" throughout and not "employer." *Complainant's Response*, p.1. However, as shown, the Sixth Circuit has interpreted the environmental whistleblower provisions to require that the Complainant's "employer" take discriminatory action in order for the claim to succeed under such provisions. *DeFord*, *supra*. Additionally, the Secretary of Labor has found this "person" argument to be without merit. *Tales v. United States Dept. of Energy*, 94-ERA-22 (Sec'y Aug. 7, 1995). Parties not "employers" of the complainant should be dismissed on that basis from suits under the whistleblower provisions at issue. *SeeStephenson v. National Aeronautics and Space Administration*, 94-TSC-05 (ALJ Rec. D. & O., June 27, 1994).

Complainant cites to *Jenkins v. EPA*, 92-CAA-06 (Sec'y May 18, 1994), in support of his claim that DOE should be held liable for its actions relating to his whistleblower litigation.

While the Secretary held in *Jenkins* that a United States government agency

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could be found liable as an employer under the whistleblower provisions in CERCLA, SDWA, CAA, and SWDA, the *Jenkins* decision is not strictly applicable to the matter before me. Jenkins was an employee of the EPA, whereas the Complainant before me is not an employee of DOE or any government agency. Rather, the Complainant is an employee of MMES. Simply because MMES operates the Oak Ridge facility, *i.e.* the Complainant's place of employment, under a contract from DOE, does not make the Complainant a DOE employee in any sense of the word.

Next, the Complainant contends DOE should be found to be his employer under the "economic realities" test. The "economic realities" test holds that an employer/employee relationship exists whenever one party controls the employment opportunities

of another party. *Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 41, 422-23 (7th Cir. 1986). According to the Complainant, because DOE issues the contract to MMES under which MMES hires employees to operate the Oak Ridge facility, DOE controls his employment because without such contract, his employment at Oak Ridge with MMES would be terminated.

Conversely, the Supreme Court has stated that unless Con

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gress clearly indicates otherwise, the common-law definition of "employee" must be used. *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344, 1349 (1992) (Title VII claim). Because the economic realities test is based on the premise that the term "employee" should be construed in light of the Act's purpose to eliminate discrimination and because such construction is broader, the Supreme Court has precluded its application. *Id.*; *See alsoWilde v. County of Kandiyohi*, 15 F.3d 103, 106 (8th Cir. 1994). In *Darden*, the Supreme Court summarized the common-law test for determining a employer/employee relationship as follows:

> In determining whether a hired party is an employee under general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skills required; the source of the instrumentalities and tools; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and, the tax treatment of the hired party.

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Darden, *supra*, at 1347 (*quoting Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (*citing* Restatement (Second) of Agency § 220(2) (1958).

It is indisputable under the *Darden* test that only MMES can be considered the Complainant's employer. MMES controls the Complainant's employment assignments, hours, compensation, and employee benefits. Furthermore, MMES represents the Complainant's "hiring party" as used throughout the *Darden* test. In no way does DOE constitute the "hiring party" of the Complainant so as to be liable as an employer under the whistleblower provision under which the Complaint is based.

Finally, Complainant contends that the Secretary's decision in *Hill & Ottney v. Tennessee Valley Authority* allows for

a party other than the complainant's employer to be found liable under the ERA's whistleblower provisions. 87-ERA-23, 24 (Sec'y May 24, 1987). However, the Secretary specifically limited her ruling in

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Hill to the narrow facts and circumstances of that case. Therefore, Complainant's reliance on *Hill* in this case in misplaced. Consequently, all claims in Count One against the DOE must be DISMISSED on the basis that DOE is not the Complainant's employer and, therefore, is not a proper party to a claim of discrimination under the whistleblower provisions at issue. *See DeFord*, *supra*.

Even assuming *arguendo* that the DOE could be found to be liable to the Complainant under the Acts, nowhere in the Complaint does the Complainant articulate how the DOE's funding policies adversely affected his employment with MMES. The Complaint alleges no facts indicating discriminatory or retaliatory motive by the DOE in contracting with MMES, wherein DOE agreed to compensate MMES for certain litigation expenses. In fact, Counsel for Complainant admits that the Complainant "cannot prove that DOE's decision [to fund MMES litigation] was motivated in part by discriminatory animus." *Complaint*, ¶ 61. Without these necessary facts, even assuming all other alleged facts to be true, Count One of the Complaint fails to state a claim for which relief can be granted and must be DISMISSED under FRCP 12(b)(6).

Furthermore, as discussed above, the DOL's jurisdiction under the statutes at issue relates to claims under such statutes' employee protection provisions. 29 C.F.R. § 24.1(a). DOL maintains no jurisdiction to decide claims contesting the DOE's, or any other government agency's, use of funds appropriated to it by Congress. Therefore, Count One of the Complaint, so far as it relates to the DOE's funding of litigation, is also DISMISSED for lack of subject

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matter jurisdiction under FRCP 12(b)(1).

Culbreth's Consultation with MMES

The Complainant also alleges, as an impropriety, Elizabeth Culbreth's association with MMES. While 29 C.F.R. § 2.2 prohibits former DOL Washington D.C. employees from appearing as an attorney before the DOL in connection with any case that was pending before the Department during her employment, the Office of Administrative Law Judges has no jurisdiction to determine the validity of a claim alleging that a former employee is acting unethically. The jurisdiction of this office in this matter is limited to the whistleblower provisions of the above-referenced statutes and does not extend to claims of possible ethical violations by former government employees. Accordingly, the

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portion of the Complaint relating to Ms. Culbreth's employment

with the Respondent MMES, and the DOE's alleged inaction with regard to such, also is DISMISSED for lack of subject matter jurisdiction.

Furthermore, the Complainant fails to articulate how Ms. Culbreth's activities in the private sector constitute discriminatory or retaliatory acts against him which adversely affected his compensation, terms, conditions or privileges of employment. Therefore, even assuming the complete veracity of the Complainant's allegations regarding Ms. Culbreth, I must find that the Complaint fails to state a claim for which relief can be granted concerning the alleged actions of Ms. Culbreth, as well as DOE's alleged consent, and is thereby DISMISSED in accord with FRCP 12(b)(6).

Count Two: DOE and Its "Old Culture" Hostility Toward Complainant and Protected Activity

Under Count Two, the Complainant addressed several alleged acts and/or omissions that he contends constitute discriminatory or retaliatory conduct by the DOE and MMES. Such alleged incidents of discrimination include:

1) DOE Secretary Hazel O'Leary's contempt for Complainant as expressed through her "facial expressions and tone of voice" at the Oak Ridge Stakeholder meeting on April 29, 1994. *Complaint*, ¶ 17.

2) Secretary O'Leary's "derision" of Complainant on April 29, 1994 which was "open, notorious and without apparent basis." *Complaint*, ¶ 18.

3) Secretary O'Leary's "cold treatment" of Complainant by refusing to answer his question on April 29, 1994. *Complaint*, ¶ 19.

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4) U. S. Senator James Sasser and U. S. Rep. Marilyn Lloyd avoided the Complainant "as if he were a pariah" after the Oak Ridge Stakeholder meeting on April 29, 1994. *Complaint*, ¶ 21.

5) Complainant was stigmatized by Secretary O'Leary at the April 29, 1994 meeting. *Complaint*, ¶ 22.

6) When Complainant was introduced at the April 29, 1994 meeting, a group of MMES employees made "multiple, audible

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murmurs expressing disdain and ridicule, including but not limited to grunts and groans." *Complaint*, ¶ 23.

7) At the April 29, 1994 meeting, the Complainant was introduced is a stigmatizing fashion, "we all know him." *Complaint*, ¶ 24.

8) MMES manager Will Minter "interrupted Secretary O'Leary's rapport with [the Complainant] by stating that he was 'in litigation'" at the April 29, 1994 meeting. *Complaint*, ¶ 24.

9) "Blacklisting in the form of defamatory statements or bad references spread by phone or in writing, including to the Secretary of Energy herself" by MMES which led to the allegedly improper conduct of the Secretary and others at the April 29, 1994 meeting. *Complaint*, ¶ 36.

DOE Secretary O'Leary's Alleged Conduct

Initially, I note that all claims against the DOE alleged in Count Two of the Complaint must be DISMISSED for reasons discussed above.

Assuming *arguendo* that DOE was Complainant's employer and subject to liability under the above-referenced provisions, I nonetheless find that the Complaint does not adequately articulate how the alleged actions or omissions by Secretary O'Leary constitute discriminatory conduct which adversely affected the terms or conditions of his employment. No claim for relief is stated if the complaint fails to plead facts sufficient to show that a legal wrong has been committed. *Sutton v. Eastern Viavi Co.*, 138 F.2d 959, 960 (7th Cir. 1943). Furthermore, there is no duty on the undersigned to conjure up unpleaded facts that might turn a frivolous claim into a substantial one. *O'Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976), *cert. denied* 431 U.S. 914. Finally, although pleadings should be given liberal construction, general allegations of wrongdoing are insufficient to state a claim for which relief may be granted. *Huey v. Barloga*, 277 F.Supp. 864, 871

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(D.C. Ill. 1967). Secretary O'Leary's comments, if true, may have been inappropriate, but the Complaint fails to establish how such comments affected his compensation, terms, conditions or privileges of employment. Thus, based on the facts pleaded in Count Two, the Complainant fails to state a claim for which relief can be granted against the DOE based on Secretary O'Leary's actions and accordingly, all claims against DOE con

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tained in Count Two are DISMISSED pursuant to FRCP 12(b)(6).

Additionally, as previously stated, all claims leveled against DOE under all statutes other than the ERA must be dismissed as untimely. From the alleged instances of discrimination by the DOE Secretary at the April 29, 1994 meeting until the filing of the Complaint over 100 days passed. Thus, the Complainant failed to submit his claim regarding these acts within statutorily mandated 30 day filing period (the ERA, as amended, allows 180 days to file). As the Complainant has alleged no facts which justify tolling the filing period, all claims relating to the April 29, 1994 meeting under all statutes other than

the ERA must be DISMISSED as untimely.

Blacklisting by MMES

The Complaint also alleges blacklisting by MMES, including phone calls to DOE, which played a part in the Secretary's and others' alleged mistreatment of the Complainant at the April 29, 1994 meeting. Regarding the alleged acts by MMES leading up to the Complainant's interaction with Secretary O'Leary on April 29, 1994, the Complainant fails to articulate any specific instance of discrimination within the filing period, *i.e.* July 2, 1994 to August 2, 1994 for all statutes except the ERA; 180 days under the ERA. General allegations, without well-pleaded facts of a specific discriminatory act within the limitations period, are not sufficient to raise the inference of discrimination. *Howard v. Tennessee Valley Authority*, 91-ERA-36 (Sec'y Jan. 13, 1993). Without a sufficiently specific allegation that the Respondent committed any act of discrimination within thirty (or 180) days of the Complainant filing his complaint, his general claim of blacklisting must be dismissed as untimely. *Rodolico v. Venturi, Rouch and Scott Brown*, 89-CAA-4 (Sec'y, Feb. 21, 1992). Accordingly, the claim of blacklisting against MMES is DISMISSED as untimely.

Furthermore, even assuming all facts in Count Two to be true, the Complaint fails to adequately express how such acts by MMES, such as allegedly bad-mouthing him to DOE officials, adversely effected the Complainant's compensation, terms, conditions or privileges of employment. Consequently, all claims against MMES

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alleged in Count Two are hereby DISMISSED under FRCP 12(b)(6) for failing to state a claim for which relief can be granted.

Count Three: Apparent Ethical Violations In Releasing Mr.

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Varnadore's Employee Medical Records

The Complaint next alleges that the Respondent MMES discriminated and retaliated against him by releasing his employee medical records. *Complaint*, ¶ 39. As a result, the Complainant was forced to relive his son's death and his own experience with cancer during his examination in depositions and hearings in connection with *Varnadore I and II*. Complaint, ¶ 37. The Complainant's allegations of retaliatory conduct by MMES relate to MMES allegedly providing its attorneys and other employees working on the *Varnadore II* case access to the Complainant's personnel file which included his medical records.

Initially, I note that the Complainant does not articulate how, if at all, such actions by MMES adversely affected his compensation, terms, conditions or privileges of employment. Secondly, the Complaint is devoid of any facts that suggest that retaliatory or discriminatory animus fueled MMES's examination of

the Complainant's medical records in preparation for the *Varnadore II* hearing. As the Complainant made workplace stress and his physical condition issues in *Varnadore I and II*, his employee medical records constituted discoverable material under the FRCP. Therefore, without facts supporting a discriminatory or retaliatory motive, a general allegation of wrongdoing is not sufficient to state a claim for which relief may be granted. The Complaint must plead facts that, if proven, would entitle the Complainant to relief. Even if the truth of his allegations is proven, the Complainant has failed to state a claim for which relief may be granted. Consequently, all allegations made in Count Three of the Complaint must be DISMISSED under FRCP 12(b)(6).

Additionally, because the Complainant's knowledge of MMES's review of his medical records dates back to his deposition relating to *Varnadore II*, the statute of limitations has expired on the Complainant's right to file a timely complaint regarding MMES's allegedly discriminatory examination of his medical records. Thus, Count Three must also be DISMISSED as untimely under all of the above-referenced statutes.

Count Four: Failure to Make Proper Postings on ERA

In Count Four, the Complainant alleges that MMES failed "to make proper postings regarding the ERA as required by law." *Com*

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plaint, ¶ 47 & 51. As a result of MMES's allegedly inadequate postings, the Complainant has allegedly suffered discrimination by continuing to be "isolated and stigmatized by [the] Respon

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dents." *Complaint*, ¶ 52. Furthermore, the allegedly inadequate postings "diminish [the Complainant's] free speech rights." *Id.*

First, assuming that Complainant's allegations regarding inadequate postings [the Complaint is not clear as to what postings the Complainant alleges are inadequate] relate to the order from *Varnadore I*, which required the Respondent MMES to make postings regarding the ERA, I find that such order was only a "recommended decision and order." As the Secretary has yet to rule on the Respondent's appeal of *Varnadore I*, the order requiring postings is not yet final and the Respondent is under no obligation to make such postings. *See* 29 C.F.R. § 24.6. Thus, MMES's postings, or lack thereof, cannot be considered inadequate nor the basis for a charge of discrimination under any of the statutes' employee protection provisions. Consequently, the claims alleged in Count Four must be DISMISSED.

Secondly, assuming the Respondents failed to comply with a final order, the Department of Labor has no jurisdiction to enforce such an order. 29 C.F.R. § 24.8(b) states that,

> "any person . . . may commence a civil action against the person to whom such order was issued to require compliance with such order. The *appropriate United States district court shall have jurisdiction* . . . to enforce such order. (emphasis added)

Thus, I find that the Department of Labor lacks subject jurisdiction over any of the claims included in Count Four of the Complaint as they relate to the postings ordered upon MMES in *Varnadore I* and must be DISMISSED accordingly.

Finally, even assuming that the Complainant's allegation of inadequate posting concerns MMES's posting requirements under 42 U.S.C. § 5851(i), the Complaint nonetheless fails to state a claim for which relief can be granted. The Complainant contends that because MMES allegedly failed to make proper postings, his working environment remained hostile because "diminishing the free speech rights of other employees diminishes [the Complainant]'s free speech rights." *Complaint*, ¶ 52. Regardless of MMES's postings, MMES employees maintained awareness of their right to sue their employer through the Complainant's prior suits of the past three years. Thus, the Complainant cannot blame any lack of knowledge of other MMES employees on the allegedly inadequate postings. Regardless, I find the Complainant's contention that because other

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employees have not exercised their right to sue under the

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whistleblower provisions he somehow has suffered an adverse employment action at the hands of MMES strains credulity. Even if MMES's ERA-required postings were proven to be inadequate, the Complaint fails to articulate how the Complainant has suffered in his employment because of such inadequacy. Thus, the Count Four of the Complaint must be DISMISSED under FRCP 12(b)(6) for failure to state a claim.

Furthermore, the Complainant cannot rely on MMES's allegedly inadequate postings to toll the filing period for his other claims. The complaint for relief for lack of adequate postings only tolls the thirty day filing period if the Complainant is unaware of his rights in absence of such postings. *Gabbrielli v. Enertech*, 92-ERA-51 (Sec'y, July 13, 1993); *Hancock v. Nuclear Assurance Corp.*, 91-ERA-33 (Sec'y Dec. 4, 1992); *Rose*, *supra*, at 1333. Clearly, as evidenced by his five prior claims under the whistleblower provisions at issue, the Complainant was well-aware of his rights under such provisions with or without such postings, adequate or inadequate. Consequently, MMES's allegedly inadequate postings will not serve to toll the filing requirements for the Complainant for any of his multiple claims.

Conclusion:

In his response to the Respondents' Motions to Dismiss, Counsel for Complainant makes the self-serving argument that his complaint represents "a precedential case of first impression" and that he is "helping the Secretary of Labor to make new law." *Complainant's Response*, p. 11. However, after extensive review of each and every allegation contained in the Complainant's rambling and disorganized 33 page complaint, I cannot discern a single claim that can withstand the motions to dismiss. As discussed above, each claim fails for multiple reasons such as: untimeliness, sovereign immunity, improper parties, lack of subject matter jurisdiction, and/or failure to state a claim for which relief can be granted.

Additionally, I take notice of the findings of Administrative Law Judge Quentin McColgin in *Stephenson*, *supra*. Regarding another complaint filed by Complainant's Counsel on behalf of complainant Stephenson, Judge McColgin found that his 44 page complaint was deficient for failing to allege or state facts showing the basis for a claim. Furthermore, Judge McColgin found that the Complainant had ample opportunity to cure such deficiency by amendment and that her counsel had extensive knowledge of the how such

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proceedings operate.

Likewise, I find that the Complainant has filed a deficient complaint and subsequently failed to cure this deficiency through amendment even though he had ample opportunity over the past ten months. Furthermore, Complainant's Counsel has extensive knowledge of these proceedings and has been notified, at the very least by the *Stephenson* decision, of what is required of a well-pleaded complaint that would withstand a motion to dismiss. Nonetheless, Counsel for Complaint has failed to heed the admonitions of Judge McColgin, and as a result, has filed another deficient complaint. Accordingly,

RECOMMENDED ORDER

IT IS RECOMMENDED that the Complainant's complaint, and all claims of unlawful activity contained therein, be DISMISSED.

ORDER

IT IS ORDERED that the hearing heretofore scheduled in this matter be and it hereby is, CANCELLED.

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DANIEL J. ROKETENETZ
Administrative Law Judge